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Mohd Shukri bin Mat (administrator to the estate of Wan Mek bt Wan Abdullah @ Wan Eshah bin Wan Abdullah) v Wan Rahmah bt Wan Abdullah (administrator to the estate of Wan Abdullah bin Wan Ahmad)

B

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO D-02(NCVC)(W)-238–02 OF 2016

LIM YEE LAN, BADARIAH SAHAMID AND ABDUL RAHMAN SEBLI JJCA

C

28 NOVEMBER 2017

Land Law — Administration — Co-proprietorship of land — Allegation by
D *beneficiaries on sale of land — Whether there was sale of land — Whether there was oral agreement between co-proprietors — Whether evidences advanced by beneficiaries admissible — Whether hearsay — Small Estate Distribution Act 1955 s 8 — National Land Code*

E The respondent ('the plaintiff') was the daughter of one Wan Abdullah and the grandniece of one Wan Mek. Wan Abdullah and Wan Mek were the co-proprietors of two pieces of land; Wan Mek held 1/3 while Wan Abdullah held 2/3 in the first land. For the second land, Wan Mek held 2/6 share while Wan Abdullah held 1/6 share together with three other co-proprietors holding
F the remaining shares. Sometime in 1992, Wan Abdullah petitioned for the distribution of Wan Mek's estate pursuant to s 8 of the Small Estate Distribution Act 1955 ('the Act'). At the conclusion of the hearing, the land administrator ('the LA') did not make any distribution order in favour of Wan Abdullah but instead appointed him as the administrator of Wan Mek's estate.
G The appellant ('the defendant'), on behalf of other beneficiaries, applied to the LA under s 17 of the Act for further determination regarding the distribution of Wan Mek's estate, as stated in his decision in Wan Abdullah's petition. During the hearing, all five of Wan Mek's beneficiaries denied that she sold her
H two undivided shares to Wan Abdullah and objected to Wan Abdullah's claim over her estate. According to the defendant, his father told him that Wan Mek had never sold her shares to anyone and the land was merely mortgaged to Wan Abdullah. The plaintiff, on the other hand, maintained that Wan Mek had sold the land to her father for which he had paid her in full. At the conclusion of the
I hearing, the LA ruled that since the parties were unable to settle the dispute, the matter should be referred to the High Court. The plaintiff subsequently filed an action at the High Court and the High Court granted declaratory reliefs to the plaintiff. Hence the present appeal. The issue that arose was whether there was a valid and enforceable oral agreement between Wan Mek and Wan

Abdullah with regard to the sale of Wan Mek's two undivided shares to Wan Abdullah. A

Held, allowing the appeal:

(1) It was rather odd, if not strange, if indeed there was an oral agreement between Wan Abdullah and Wan Mek, that Wan Abdullah made no mention of it at all during his own testimony in 1992 and he had to depend on his brother to do so in 1994. It smacked of an afterthought on his part, probably after his claim as the sole beneficiary of Wan Mek was rejected by the LA. Since his brother was not a party to the sale transaction, whatever he said before the LA was based on what was told to him by Wan Abdullah which would make his statement a hearsay (see para 73). B C

(2) The plaintiff's object in introducing the sworn statements of Wan Abdullah and his brother was not to establish the fact that those statements were made by them, in which case there were not hearsay and not inadmissible. Rather, her object in introducing those statements was to establish the truth of those statements. Hence, the exhibits were pure documentary hearsay which were inadmissible as evidence and even if they were admissible as evidence, very little, if any, weight could be given to them (see para 76). D E

(3) The oral testimonies of the plaintiff and her aunt relating to the oral agreement were not based on their personal knowledge but on information they received from Wan Abdullah and his brother. The so-called circumstantial evidence did not serve the plaintiff's case in the sense that they arose mainly as incident of a land held under co-proprietorship. Land held under co-proprietorships are governed by Part 21 of the National Land Code ('the NLC') encompassing ss 342–345. When land is held under a co-proprietorship, each co-proprietor is entitled to the possession and enjoyment of the whole of land unless by agreement of the co-proprietors, a specific area equivalent to a co-proprietor's undivided share(s) in the land has been specifically carved out are delineated for the exclusive use of the co-proprietor. There was no evidence before the court that any specific area on the two lots had been delineated for the exclusive use of Wan Mek and Wan Abdullah had been occupying those areas (see paras 79, 84 & 86). F G H

(4) Apart from the uncertainty in terms, there was no evidence of Wan Mek having given any duly executed, valid, registrable transfer of the land in a proper instrument of transfer in favour of Wan Abdullah. There was no valid reason for Wan Abdullah, during his lifetime, not to pursue his claim while Wan Mek was still alive or immediately after her death. The plaintiff failed to discharge her evidential burden of establishing a prima I

A facie case against the defendant on a balance of probabilities. There was simply no case for the defendant to answer or rebut (see paras 94, 96 & 102).

[Bahasa Malaysia summary

B Responden ('plaintif') adalah anak perempuan seorang bernama Wan Abdullah dan cucu perempuan seorang bernama Wan Mek. Wan Abdullah dan Wan Mek adalah pemilik bersama dua bidang tanah; Wan Mek memegang 1/3 manakala Wan Abdullah memegang 2/3 dalam tanah pertama. Bagi tanah kedua, Wan Mek memegang 2/6 bahagian manakala Wan Abdullah C memegang 1/6 bahagian bersama-sama dengan tiga pemilik bersama lain yang memegang baki bahagian. Kira-kira tahun 1992, Wan Abdullah mempetisyen pembahagian pusaka Wan Mek bawah s 8 Akta Pembahagian Pusaka Kecil 1995 ('Akta'). Pada penutup pendengaran, Pentadbir Tanah ('PT') tidak membuat apa-apa perintah berpihak pada Wan Abdullah tetapi sebaliknya D melantiknya menjadi pentadbir pusaka Wan Mek. Perayu ('defendan'), bagi pihak lain-lain benefisiari, memohon pada PT bawah s 17 Akta bagi pemutusan lanjut pembahagian pusaka Wan Mek, seperti yang dinyatakan dalam keputusan dalam petisyen Wan Abdullah. Semasa perbicaraan, kelima-lima benefisiari Wan Mek menafikan dia menjual kedua-dua bahagian E tidak berbahagi kepada Wan Abdullah dan membantah tuntutan Wan Abdullah terhadap pusakanya. Menurut defendan, bapanya memberitahunya bahwa Wan Mek tidak pernah menjual bahagiannya kepada siapa-siapa pun dan tanah ini sekadar dipajak pada Wan Abdullah. Plaintif, sebaliknya, F mendakwa Wan Mek telah menjual tanahnya kepada bapanya dan bapanya telah membayar bayaran penuh. Pada penutup perbicaraan, PT memutuskan bahawa oleh kerana pihak-pihak tidak dapat menyelesaikan pertikaian mereka, perkara ini harus dirujuk di Mahkamah Tinggi. Plaintif seterusnya memfailkan satu tindakan di Mahkamah Tinggi dan Mahkamah Tinggi memberi relif-relif G deklatori kepada plaintif. Oleh itu rayuan ini. Isu yang timbul adalah sama ada terdapat perjanjian lisan yang sah dan boleh dikuatkuasakan antara Wan Mek dan Wan Abdullah bagi jualan dua bahagian tidak berbahagi Wan Mek kepada Wan Abdullah.

H **Diputuskan**, membenarkan rayuan:

(1) Aneh, jika tidak pelik, jika sememangnya terdapat perjanjian lisan antara Wan Abdullah dan Wan Mek, Wan Abdullah tidak menyatakan langsung tentang ini semasa keterangannya pada 1992 dan dia bergantung pada saudara lelakinya untuk berbuat demikian pada 1994. Ini satu fikiran I semula olehnya, mungkin selepas tuntutannya sebagai benefisiari tunggal Wan Mek ditolak oleh PT. Oleh kerana saudara lelakinya bukan pihak dalam transaksi tunggal tersebut, apa-apa yang dinyatakan kepada PT adalah berdasarkan apa yang diberitahu oleh Wan Abdullah kepadanya, menjadikan keterangannya satu dengar cakap (lihat perenggan 73).

(2) Tujuan plaintif mengemukakan pernyataan-pernyataan bersumpah Wan Abdullah dan saudara lelakinya bukan untuk membuktikan fakta-fakta tersebut dibuat oleh mereka, yang mana bukan dengar cakap atau bukan tidak boleh diterima. Sebaliknya, tujuannya mengemukakan pernyataan-pernyataan tersebut adalah untuk membuktikan kebenaran pernyataan-pernyataan tersebut. Oleh itu, ekshibit-ekshibit ini adalah dengar cakap dokumentar semata-mata yang tidak boleh terima masuk sebagai keterangan dan jika pun diterima masuk sebagai keterangan, hanya sedikit, jika ada, pemberatan boleh diberi padanya (lihat perenggan 76).

(3) Keterangan lisan plaintif dan ibu saudaranya berkaitan dengan perjanjian lisan tersebut bukan berdasarkan pengetahuan peribadi mereka tetapi tentang maklumat yang mereka terima daripada Wan Abdullah dan saudara lelakinya. Dakwaan keterangan ikut keadaan tidak berpihak pada kes plaintif dalam erti kata bahawa kesemuanya timbul terutamanya sebagai insiden tanah yang dipegang bawah milikan bersama. Tanah yang dipegang bawah milikan bersama dikawal oleh Bahagian 21 Kanun Tanah Negara ('NLC') merangkumi ss 342–345. Apabila tanah dipegang bawah milikan bersama, setiap pemilik bersama-sama berhak pada milikan dan kenikmatan seluruh tanah kecuali dengan persetujuan pemilik-pemilik bersama, satu kawasan tertentu yang setara dengan gabungan bahagian yang tidak berbahagi dalam tanah yang telah dibentuk secara khusus diuraikan untuk kegunaan eksklusif pemilik bersama. Tidak ada keterangan di hadapan mahkamah bahawa mana-mana kawasan tertentu di kedua-dua lot telah digariskan untuk kegunaan eksklusif Wan Mek dan Wan Abdullah telah menduduki kawasan tersebut (lihat perenggan 79, 84 & 86).

(4) Selain ketidakpastian terma, tidak ada keterangan tentang Wan Mek yang telah memindah milik tanah yang sah, dan boleh didaftarkan dengan instrumen yang betul yang berpihak pada Wan Abdullah. Tidak ada sebab yang sah untuk Wan Abdullah, semasa hayatnya, untuk tidak membuat tuntutan sementara Wan Mek masih hidup atau sejurus selepas kematiannya. Plaintif gagal melepaskan beban membuktikan kes prima facie terhadap defendan atas imbangan kebarangkalian. Tidak ada kes bagi defendan untuk menjawab atau menolak (lihat perenggan 94, 96 & 102).]

Notes

For cases on administration in general, see 8(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2578–2618.

Cases referred to

Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd [1996] 2 MLJ 12; [1996] 2 CLJ 561, FC (refd)

China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal [1996] 2 MLJ 517; [1996] 3 CLJ 163, FC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor [1981] 1 MLJ 139, FC (refd)

Kong Ming Trading Sdn Bhd v MTS Construction & Trading Sdn Bhd & Anor [2017] 3 MLJ 267; [2016] 1 LNS 1343, CA (refd)

Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Sivalingam a/l Periasamy & Anor v Periasamy & Anor [1995] 3 MLJ 395; [1996] 4 CLJ 545, CA (refd)

Subramaniam v PP [1956] 1 MLJ 220, PC (folld)

Sulisen Sdn Bhd v Kerajaan Malaysia [2006] MLJU 341; [2006] 7 CLJ 247, HC (refd)

Temenggong Securities Ltd & Anor v Registrar Of Titles, Johore & Ors [1974] 2 MLJ 45, FC (refd)

Tinduk Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229; [1979] 1 LNS 119, FC (refd)

UN Pandey v Hotel Marco Polo Pte Ltd [1980] 1 MLJ 4 (refd)

Legislation referred to

Contracts Act 1950 s 10

Evidence Act 1950 ss 101, 103

Land Enactment of Kelantan 1938

National Land Code ss 14(1)(e), 93, 100, 206, 207, 323, 342, 343, 343(1)(b), (2), 344, 345, 380(1), Part 21, Form 14A

Small Estate Distribution Act 1955 s 8, 13, 13(4), (5), 17, 17(4), (5)

Appeal from: Civil Suit No MT(1) 22-NCVC-82–10 of 2014 (High Court, Kota Bharu)

Ahmad Fadhli bin Salleh (Fadzil & Eddin) for the appellant.

Abqary bin Abd Aziz (Che Mohd Firdaus bin Che Soh with him) (Abqary Aziz & Co) for the respondent.

Lim Yee Lan JCA:

INTRODUCTION

[1] This is an appeal by the appellant (the defendant at the High Court) against the decision of the Kota Bharu High Court dated 14 March 2016 which had granted several declaratory reliefs to the respondent (the plaintiff at the High Court) after a full trial.

BACKGROUND FACTS

[2] The plaintiff was the daughter of one Wan Abdullah bin Wan Ahmad ('Wan Abdullah') and grandniece of one Wan Mek bt Wan Abdullah @ Wan Eshah bt Wan Abdullah ('Wan Mek').

[3] Wan Abdullah and Wan Mek were the co-proprietors of two pieces of land situated in Kota Bharu, Kelantan, known as Lot 505 held under GM 2686 situated at Kg Pdg Penyadak, Daerah Pendek, Mukim Tiong, Jajahan Kota Bharu, Kelantan (in which Wan Mek held 1/3 share while Wan Abdullah held 2/3 share) and Lot 1001 held under GM 892 situated in Kampong Paya Dusun Nyior, Daerah Kota Bharu, Mukim Jelutong, Jajahan Kota Bharu, Kelantan (in which Wan Mek held 2/6 share while Wan Abdullah held 1/6 share together with three other co-proprietors holding the remaining shares). (Wan Mek's two undivided shares which formed the subject-matter of the oral sale and purchase shall hereinafter be referred to as 'the said land' or 'the two undivided shares' where the context requires).

[4] The plaintiff claimed that Wan Mek passed away on 13 December 1966 while her father (Wan Abdullah) passed away on 14 December 2006.

Historical background leading to the filing of the plaintiff's action

[5] What transpired was that sometime in 1992 Wan Abdullah had petitioned for the distribution of Wan Mek's estate pursuant to s 8 of the Small Estate Distribution Act 1955 ('the Act').

[6] Section 8 of the Act reads as follows:

> (1) *Where any person has died intestate leaving a small estate, any person claiming to be interested in the estate as a beneficiary*, or a creditor, *or a purchaser,* or in the circumstances mentioned in subsection 18(1) the penghulu or a Settlement Officer of the district or of the locality in which any land of which the deceased was the proprietor is situated, or the Official Administrator, *may lodge with the Land Administrator at any district wherever the immovable property comprised in the estate is situated a petition in the prescribed form, for the distribution of the estate.*

[7] Section 13 specifies the order that the land administrator can make at the conclusion of the hearing. In particular, sub-ss (4) and (5) of s 13 provide as follows:

> (4) *If the nature of the case so requires the Land Administrator shall, instead of* or in addition to *making a distribution order, grant letters of administration to such person as he shall think fit,* subject to such security as he may require and may in his discretion dispense with security. *The letters of administration shall be subject to such limitations*

as the Land Administrator may think fit to specify in the grant.

(5) *If the Land Administrator finds that any person has proved his claim to be a purchaser within the meaning of section 2 of any land registered in the name of the deceased he shall, by his order, transmit the land to the purchaser,* subject to such conditions as to the payment of any outstanding balance of the purchase money or otherwise as he may think fit to impose.

[8] Wan Abdullah's petition was heard on three different dates between 1992–1994.

[9] At the first hearing on 25 February 1992, Wan Abdullah testified on his own behalf as follows:

> Saya tinggal di Kg Penyedap, pendek, berumur 69 tahun. Bekerja sendiri. Simati, Wan Mek@Wan Eshah bte Wan Abdullah adalah ibu saudara saya sebelah bapa saya. Ia telah mati pd tahun 1966 di Kg Kok Tar Selatan, Thailand. Ahli warisnya:
>
> Anak-anak:
>
> (a) Wan Embong bt Hj Wan Hassan anak2
>
> (b) Wan Bidah bt Hj Wan Hassan
>
> (c) Wan Setapa bt Hj Wan Hassan
>
> (d) Wan Sepiah bt Hj Wan Hassan
>
> (e) Wan Zainab bt Wan Hassan a/p-Tg Datt Tumpat
>
> Saya mendapat tahu kesemua anak2 simati telah mati di Selatan Thai. Ahli warisnya tidak dapat dikesan lagi.

[10] After Wan Abdullah's testimony the land administrator postponed the hearing with the note:

> *Bicara ditangguhkan untuk mengesan waris2 berhak atas pesaka ini di Selatan Thailand.*

[11] At the second hearing on 8 March 1992, a grandson of Wan Mek by the name of Abd Rashid bin Ali appeared and according to the notes of proceedings he had informed the land administrator as follows:

> Mengenai harta pusaka ini saya bersetuju tolak kepada pemohon. Saya tiada tuntut lain lagi kerana saya mendapat tahu ia telah dibeli daripada Simati.

[12] On the third hearing on 20 November 1994, Wan Mohamed Zain bin Wan Ahmad (Wan Mohamed Zain), a brother of Wan Abdullah, appeared as a witness and informed the land administrator as follows:

Saya, Wan Mohamed Zain adalah anak saudara si mati. Saya akui simati Hjh Wan Mek telah mati di Kg Kok Tar. Anaknya — 4 orang seperti yang tersebut di atas dan kini kesemuanya telah mati.

Sebenarnya simati telah jual tanah-tanah ini kepada Wan Abdullah bin Wan Ahmad dan ia telah cuba untuk buat pindah milik kepadanya tetapi tidak dapat dibuat kerana namanya berbeza-perlu dibetulkan dulu. Selepas itu dia kembali ke Thailand dan mati di sana. Saya akui bahawa tidak ada pertelingkahan untuk tuntut tanah ini di antara pemohon dan lain-lain orang.

[13] At the conclusion of the hearing the land administrator did not make any distribution order in favour of Wan Abdullah but instead appointed him as the administrator of Wan Mek's estate, for the following reasons:

Oleh kerana ahli waris pusaka ini tidak dapat dikesan maka saya putuskan tanah pusaka ini diserahkan kepada Pemohon sebagai Pentadbir/Penguasa Pusaka. Penguasa ini boleh di batalkan dengan perintah di bawah seksyen 17 SEDA 1955 apabila semua ahli waris-waris berhak dapat dikesan.

[14] Wan Mohamed Zain subsequently swore a statutory declaration ('SD') dated 28 March 2012 in which for the first time he stated that he knew Wan Abdullah paid RM4,000 to purchase the said land and that he had personally witnessed his brother passing the money to Wan Mek.

The defendant's application under s 17 of the Act

[15] Sometime in 2012 the defendant on behalf of other beneficiaries applied to the land administrator under s 17 of the Act for further determination regarding the distribution of Wan Mek's estate as stated in his decision dated 20 November 1994 in regard to Wan Abdullah's petition.

[16] Section 17 reads as follows:

(1) *Where it becomes necessary to appoint* a new trustee or *a new administrator or to make any other or further order* or to withdraw a caveat *the party interested may make an application to the Land Administrator*, in the prescribed form or in any other form which the Land Administrator may permit, *and thereupon the Land Administrator shall investigate the matter and cause notice to be given to any other party affected and if the matter is contentious he shall set it down for hearing in the same manner as a petition for distribution under this Act and after the investigation or hearing he shall make such order or do any other act as may be necessary to give effect to his decision and if necessary shall arrange for the order so far as it relates to land to be registered as may be necessary.*

(2) ...

(3) ...*The Land Administrator may for any cause he thinks fit at any time either of his own motion or on the application of any beneficiary* or creditor *revoke any grant of*

A *administration made by him* and may likewise order any administrator to file accounts or to supply such other particulars concerning the administration of the estate as he may require.

B **[17]** Hearing of defendant's application was conducted on 25 March 2012 and 20 August 2013. During the first hearing, two grandchildren and three great-grandchildren (including the defendant) of Wan Mek and the plaintiff (as the administrator of Wan Abdullah's estate) and her son, Zahrudin, appeared before the land administrator.

C

[18] During the hearing all the five beneficiaries of Wan Mek denied that she had sold her two undivided shares in Lot 505 and Lot 1001 to Wan Abdullah and objected to the Wan Abdullah's claim over her estate. According to the defendant, his father had told him that Wan Mek had never sold her shares to
D any one and as far as he knew from his father the land was merely mortgaged to Wan Abdullah.

[19] The plaintiff, on the other hand, maintained her ground that Wan Mek had during her life time sold the land to her father for which he had paid her in
E full. The plaintiff also informed the land administrator she was willing to settle the claim in consideration of the payment of the sum of RM200,000 from Wan Mek's beneficiaries.

F **[20]** The plaintiff's son, Zahrudin, on the other hand, informed the land administrator that he was told that his grandfather had bought the said land from Wan Mek for a sum of RM5,000 and his uncle, Wan Mohamed Zain (since deceased), had witnessed his grandfather passing the purchase price to Wan Mek.

G

[21] At the conclusion of the hearing, the land administrator ruled that since the parties were unable to settle the dispute over the status of the two undivided shares, the matter should be referred to the High Court for a determination. Accordingly, pursuant to sub-ss 17(4) and (5) of the Act, the land
H administrator proceeded to make an order to revoke Wan Abdullah's appointment as the administrator of Wan Mek's estate (on the ground that he had passed away) and appointed both the plaintiff and the defendant as the joint-administrators of her estate until such time the status of the said land is determined by the High Court.

I

Declaratory reliefs sought by plaintiff in her action

[22] Pursuant to the land administrator's order, the plaintiff subsequently filed this action to seek, inter alia, the following declaratory reliefs:

(a) Pengisytiharan bahawa wujud Perjanjian/Persetujuan Wan Mek binti Wan Abdullah @Wan Eshah bt Wan Abdullah, si-mati telah menjual bahagiannya di dalam hartanah Lot 505, GM 2686, Kg. pdg. Penyadak, Daerah Pendek, Mukim Tiong, Jajahan Kota Baharu, Kelantan (1/3 bahagian) DAN hartanah Lot 1001, GM 892, Kampung Paya Dusun Nyior, Daerah Kota Baharu, Mukim Jelutong, Jajahan Kota Baharu, Kelantan (2/6 bahagian) kepada Wan Abdullah bin Wan Ahmad, si mati semasa hayat kedua-dua simati.

(b) Pengisytiharan bahawa Wan Abdullah bin Wan Ahmad, simati merupakan pemilik benefisial terhadap hartanah Lot 505, GM 2686, Kg. Pdg. Penyadak, Daerah Pendek, Mukim Tiong, Jajahan Kota Baharu, Kelantan (1/3 bahagian) DAN hartanah Lot 1001, GM 892, Kampung Paya Dusun Nyior, Daerah Kota Baharu, Mukim Jelutong, Jajahan Kota Baharu, Kelatan (2/6 bahgaian) milik Wan Mek binti Wan Abdullah @Wan Eshah binti Wan Abdullah, simati.

(c) Pengisytiharan bahawa Wan Mek binti Wan Abdullah @Wan Eshah binti Wan Abdullah/Defendan merupakan hanya 'Bare Trustee' dan memegang hartanah Lot 505, GM 2686, Kg. Pdg. Penyadak, Daerah Pendek, Mukim Toing, Jajahan Kota Baharu, Kelantan (1/3 bahagian) DAN hartanah Lot 1001, GM 892, Kampung Paya Dusun Nyior, Daerah Kota Baharu, Mukim Jelutong, Jajahan Kota Baharu, Kelantan (2/6 bahagian) bagi pihak Wan Abdullah bin Wan Ahmad, simati.

Evidence adduced by the plaintiff during the trial

[23] During the trial, to prove her claim that an oral agreement existed between her father and Wan Mek regarding her two undivided shares in Lot 505 and Lot 1001, the plaintiff relied primarily on the following documentary and oral evidence:

(a) the notes of proceedings containing the sworn statements made by Wan Abdullah, Wan Mohamed Zain and Abd Rashid bin Ali during the hearing of Wan Abdullah's petition for Wan Mek's estate, which were tendered by the plaintiff through an officer from the Small Estate Distribution Section of the Kota Bharu Land Office ('SP1') and marked as exh P1;

(b) the SD of Wan Mohamed Zain which the plaintiff tendered and was marked as exh P9; and

(c) the plaintiff's own oral testimony as SP3 and the testimony of Wan Mohamed Zain's wife as SP2.

[24] The gist of the plaintiff's oral testimony was that she was informed by her father on several occasions that he had bought over the land from Wan Mek sometime in the 1950's and he had settled in full the purchase price of RM4,000 in three installments to Wan Mek.

[25] The plaintiff also informed the court that after purchasing the land from Wan Mek, her father had taken full possession of the same and had built a house on Lot 505 and planted rubber and some other fruit trees on Lot 1001. After his death, she and her family had continued with the occupation of Lot 505 and the cultivation of Lot 1001.

[26] The plaintiff further testified that neither Wan Mek nor her descendants/beneficiaries had ever protested against the taking over possession of the land by her father nor did they at any time take any action to evict her father and her family from the land. It was only in 2012 when the defendant applied for distribution of Wan Mek's estate that he and her other beneficiaries sought for the first time to deny the existence of the agreement between Wan Mek and her father.

[27] According to the plaintiff after having purchased the two undivided shares from Wan Mek her father had taken over the custody of the documents of title of Lots 505 and 1001 and after his passing away in 2006 the said documents of title had remained in her custody.

[28] The plaintiff further added that as the beneficial owner of the two undivided shares her father had been paying the quit rent for the two lots and after his death she has continued with the payment of the quit rent.

[29] As for SP2, the wife of Wan Mohamed Zain (and aunt of the plaintiff), she informed the court that she had stayed with Wan Abdullah in his house for several years after her marriage to Wan Mohamed Zain. She remembered Wan Abdullah telling her husband and her that Wan Mek had sold the land to him. She and her husband had also witnessed Wan Abdullah handing over some money to Wan Mek at his house on one occasion and when her husband asked what was the purpose for the money Wan Abdullah had replied that it was the purchase price for the land.

The defendant's evidence

[30] The defendant in his defence denied the plaintiff's claim and also called three witnesses to refute the plaintiff's claim. The defendant himself testified as SD2 while two other grandsons of Wan Mek testified as SD1 and SD3 respectively.

[31] The defendant and his witnesses denied that Wan Mek died sometime in 1996 as claimed by the plaintiff. They claimed that Wan Mek passed away sometime in the year 1969.

[32] Basically, the defendant's case was that the family of Man Mek including

himself had no knowledge whatsoever of the alleged agreement between her and Wan Abdullah regarding the sale of her two undivided shares to him. Neither was there any documentary proof before the court that a valid written agreement existed between Wan Mek and Wan Abdullah.

[33] According to the defendant, a search of the two documents of title to Lot 505 and Lot 1001 confirmed that Wan Mek remained as a co-proprietor of her two undivided shares therein and there was no endorsement thereon either of any transfer from Wan Mek to Wan Abdullah. The only endorsement was vide 684/94 which showed that Wan Abdullah was appointed as the administrator of Wan Mek's estate.

[34] The defendant in his testimony also alleged that his father had told him that Wan Abdullah had illegally taken over (*rampas*) and or trespassed on Wan Mek's two undivided shares and that he and his father and other family members had on several occasions gone to Wan Abdullah's house to try to resolve the matter but Wan Abdullah would turn aggressive and threatened them with a *parang*. He did not make any police report because it was a family matter and he was hoping to resolve the matter amicably.

[35] The defendant maintained that Wan Mek remained the lawful registered owner of her two undivided shares in Lot 505 and Lot 1001 and as the registered owner she had an indefeasible title over the two said undivided shares.

Submission at the High Court

[36] At the close of the trial, it was submitted on behalf of the plaintiff by her learned counsel that based on the totality of the oral and documentary evidence adduced by the plaintiff and her witnesses, the plaintiff had discharged her burden of proving that an oral agreement existed between her grandaunt, Wan Mek, and her father, Wan Abdullah, on a balance of probabilities.

[37] It was submitted, as decided by the Supreme Court in the case of *Temenggong Securities Ltd & Anor v Registrar Of Titles, Johore & Ors* [1974] 2 MLJ 45, that after the payment of the full purchase price and after having taken over full possession of the two undivided shares, Wan Abdullah became the beneficial owner of Wan Mek's undivided shares and Wan Mek as the registered proprietor merely held the said undivided shares as bare trustee for Wan Abdullah. The plaintiff was therefore entitled to the declaratory reliefs sought in her action.

A **[38]** It was further submitted that the defence was a bare denial and an afterthought which did not rebut the plaintiff's case, which was supported and corroborated by cogent and credible evidence.

B **[39]** In the case of the defendant, it was submitted on his behalf that the plaintiff had failed to prove her case on a balance of probabilities because the oral and documentary evidence adduced by her consisted mainly of hearsay evidence which surfaced long after the death of Wan Mek which had no probative value in law to support her claim.

C **[40]** It was submitted that if it was true that there was such an oral agreement, it was unbelievable that Wan Abdullah did not immediately apply to effect the transfer of the said land to himself during Wan Mek's life time or filed a claim for the same from her estate immediately upon her death. He D applied for the distribution of her estate only in 1992, which was 26 years after her demise.

[41] It was further submitted that even if there was such an oral sale which was denied, Wan Abdullah and the plaintiff were guilty of laches and delay in E prosecuting their claim over their alleged beneficial ownership of the said land, to entitle them to the declarations sought. The court should not come to the aid of an indolent party whose inaction had prejudiced the right of Wan Mek's beneficiaries, including the defendant.

F **[42]** It was further submitted that Wan Mek's indefeasible title over her two undivided shares cannot in law be defeated by some vague and uncertain oral agreement which allegedly took place some 30 over years ago.

G *Decision of the High Court*

[43] On 14 March 2016, at the conclusion of the trial, the learned judicial commissioner ('JC') found in favor of the plaintiff and granted the aforementioned declaratory reliefs to her with costs. Briefly, the learned JC's H decision was premised on the following findings.

[44] It is not in dispute that there was no written agreement regarding the sale and purchase of the land between Wan Mek and Wan Abdullah.

I **[45]** It is clear from s 10 of the Contracts Act 1950 that a contract need not be in writing and can be entered into orally. A valid and legally binding contract comes into being between two parties if the three elements forming a contract, namely, offer, acceptance and consideration are present.

[46] It was also undisputed that there are two versions before the court, that of the plaintiff who asserts that there was an oral sale of the land from Wan Mek to Wan Abdullah in the sum of RM4,000, and that of the defendant who denied the existence of such an oral agreement. In such a case it was the duty of the court to decide which of the two versions was more probable. A B

[47] Having evaluated the totality of the evidence before the court, the court found the plaintiff's version to be more probable as it was supported by the documentary evidence in exhs P1 and P9 and the oral testimony of SP2 and SP3 which the court found to be credible. C

[48] P1 and P9 clearly supported the plaintiff's version regarding the existence of the oral agreement. In addition, the oral testimony of SP2, who was the wife of Wan Mohamed Zain and aunt of the plaintiff, and the plaintiff ('SP3')'s own testimony also supported the plaintiff's case of an oral agreement. D

[49] The plaintiff had also testified that after the sale and purchase Wan Abdullah had taken over possession of the said land and had constructed a house and cultivated rubber and other fruit trees on the land without any objection from Wan Mek while she was still alive or her beneficiaries after her death in 1966. E

[50] SP3 also testified that after the oral sale and purchase in the 1950's her father had been paying the quit rent for lots 505 and 1001 and after his death she had been doing the same. F

[51] The plaintiff's testimony also showed that after the death of Wan Mek in 1966 and Wan Abdullah in 2006, none of the beneficiaries of Wan Mek had come forward to deny the existence of the oral agreement between her father and Wan Mek until the defendant filed his application under s 17 of the Act. G

[52] Based on the totality of the evidence of the plaintiff as narrated above, the court was satisfied that a valid and enforceable oral contract came into being between Wan Mek and Wan Abdullah after Wan Abdullah accepted Wan Mek's offer to purchase her two undivided shares sometime in the 1950's and upon his full payment of the purchase price of RM4,000. H

[53] As rightly pointed out by learned counsel for the plaintiff, by virtue of the Federal Court's decision in the case of *Temenggong Securities Ltd & Anor*, Wan Abdullah having paid the full purchase price had become the beneficial owner of the land and Wan Mek as registered proprietor was merely holding the two undivided shares as a bare trustee for Wan Abdullah. I

A **[54]** On the other hand, the court found the defendant's version to be a bare denial and afterthought which could not rebut the oral and documentary evidence adduced by the plaintiff.

B **[55]** In particular, the court found the defendant ('SD2') an evasive and unreliable witness who gave inconsistent and contradictory testimony which cannot be relied upon by the court.

C **[56]** For example, when asked about the details of the discussion between his delegation and Wan Abdullah at Wan Abdullah's house, at first SD2 replied 'tidak tahu' but later changed his answer to 'tidak pasti'. He however could remember vividly that Wan Abdullah threatened his delegation with a *parang*. This showed that SD2's averment about leading a delegation to Wan Abdullah's house for a discussion was untrue and a recent invention.

D **[57]** Further, in his examination-in-chief SD2 stated that Wan Mek did not tell his family regarding the sale of her two undivided shares but during cross-examination he contradicted himself and stated that Wan Mek did tell his family that she did not sell her undivided shares to Wan Abdullah.

E **[58]** SD2 also claimed during his cross-examination that Wan Mek did not mortgage (*gadai*) her undivided shares to Wan Abdullah. This contradicted his testimony during the hearing of his application under s 17 of the Act (as recorded in exh P3) where he had informed the land administrator that he knew Wan Mek had mortgaged her two undivided shares to Wan Abdullah.

F **[59]** SD2 also told the court that his father had informed him that Wan Abdullah had trespassed/encroached on Wan Mek's land, but he failed to adduce any proof of his averment, such as a police report in which he or his father complained about the encroachment or trespass. Neither he nor his father took any positive action to reclaim the said land during the life time of Wan Abdullah. In addition, SD2 who was born in 1967 and claimed his great grandmother had passed away sometime in 1969, was too young to know or understand what had transpired between Wan Mek and Wan Abdullah regarding the said land and whatever he heard about the matter from his father was purely hearsay.

G **[60]** The court thus concluded that SD2's testimony was a recent invention and had been tailored to suit his defence because he knew that by the year 2012 all the contemporaries of Wan Abdullah were no longer living and the plaintiff could not possibly call any witness to deny his allegations.

H

I

DECISION OF THIS COURT

[61] Aggrieved by the High Court's decision the defendant appealed to this court. During the hearing before us, respective counsels in their oral and written submissions basically repeated the submissions they had made before the learned JC at the High Court.

[62] At the conclusion of hearing the appeal, we had unanimously allowed the defendant's appeal with costs and set aside the decision and order of the High Court. We now set out the reasons for our decision.

REASONS FOR OUR DECISION

[63] It is clear from the submission of learned counsels that there was only one issue for our determination in the appeal, that is, was the learned JC right in holding that there was a valid and enforceable oral agreement between Wan Mek and Wan Abdullah with regard to the sale of Wan Mek's two undivided shares in Lots 505 and 1001 to Wan Abdullah at the alleged purchase price of RM4,000?

[64] As rightly pointed out by the learned JC, there was no written agreement between Wan Mek and Wan Abdullah in which she had agreed to sell her two undivided shares to Wan Abdullah and the plaintiff was basically relying on an oral agreement between the two of them regarding the same.

[65] We of course have no quarrel with the learned JC that a valid and enforceable contract can be made orally. In this regard, we would refer to the case of *Sulisen Sdn Bhd v Kerajaan Malaysia* [2006] MLJU 341; [2006] 7 CLJ 247 in which Abdul Malik Ishak J (as he then was) had set out the following guideline on what constitutes a valid and enforceable contract:

> A simple contract requires little formality. A contract may be written; it may be partly written and partly oral; it may be wholly oral and may even be implied from the actions of the parties. The essentials of any contract are the rights, duties and liabilities that arise from the promise or promises made by the parties. ... The essential elements of any contract are:
>
> (i) offer;
>
> (ii) acceptance;
>
> (iii) consideration (not required for contracts under seal);
>
> (iv) intention to be bound;
>
> (v) mutuality;
>
> (vi) capacity; and

(vii) legality.

The offer and acceptance when taken together would form the 'agreement' and that agreement must be supported by consideration in order to establish the obligation …

[66] It is trite law that any person who asserts a fact must prove that fact, and in a civil case, on a balance of probabilities. Hence, in this case, the burden is on the plaintiff, who asserts that an oral agreement exists between Wan Mek and her father as regards the said land, to prove that fact and in order to do so, she would need to adduce sufficient cogent and credible evidence to prove each and every element of a valid and enforceable contract, before she can succeed in her claim against the defendant (see: ss 101 and 103 of the Evidence Act 1950).

[67] It is also trite law that unless and until the plaintiff has discharged her *evidential* burden of establishing a prima facie case, there is no burden on the defendant to prove his defence, no matter how weak or unbelievable his defence might have been (see: *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* [1981] 1 MLJ 139).

[68] Having carefully considered the written and oral submissions of learned counsels before us and having evaluated and reviewed the body of evidence adduced by the plaintiff as appeared in the record of appeal, we were inclined to agree with learned counsel for the defendant that the learned JC erred in law and in fact when he came to the conclusion, based on the totality of the evidence before him of the plaintiff, that she had succeeded in discharging her legal and evidential burden in proving the fact that an oral agreement existed between Wan Mek and Wan Abdullah as regards the sale and purchase of the said land. We say so for the following reasons.

Analysis of the plaintiff's evidence

[69] As stated earlier, the plaintiff had relied primarily on exhs P1 and P9 and her own and SP2's oral testimony to prove the truth of her claim.

[70] In regard to the sworn statements made by Wan Abdullah, Wan Mohamed Zain and Abd Rashid bin Ali during the hearing of Wan Abdullah's petition for Wan Mek's estate as appeared in P1, an examination of these statements would show that they did not provide clear proof of the oral agreement.

[71] Wan Abdullah, who was the pivotal character and the only person who could provide direct evidence on the oral agreement, made no mention whatsoever in his sworn statement in P1 regarding the oral agreement between

him and Wan Mek. Indeed, it would appear from his sworn statement as set out earlier that he was relying solely on his familial relationship with Wan Mek as the basis to inherit her estate.

[72] In fact, the alleged oral agreement only surfaced for the first time through the testimony of Abd Rashid bin Ali a grandson of Wan Mek who, on the second hearing date, told the land administrator that he had no objection to Wan Abdullah's claim because he 'understood' that Wan Mek had already sold the land to Wan Abdullah. He of course did not provide any details about the sale and purchase transaction other than making the bare statement. The second time the alleged oral agreement was mentioned was in the sworn statement of Wan Mohamed Zain during the continued hearing in 1994, when he told the land administrator that Wan Mek had already sold the two undivided shares to his brother, again without giving any details as to when and where the alleged agreement took place, how much was the purchase price and when it was paid to Wan Mek. Thus, Wan Mohamed Zain's and Abd Rashid bin Ali's sworn statements were absolutely of no evidential value to prove all the elements of a valid and enforceable oral agreement between Wan Mek and Wan Abdullah.

[73] In fact we found it rather odd if not strange, if indeed there was such an oral agreement between him and Wan Mek that Wan Abdullah made no mention of it at all during his own testimony in 1992 and he had to depend on his brother to do so in 1994. It therefore smacked of an afterthought on his part, probably after his claim as the sole beneficiary of Wan Mek under s 8 of the Act was rejected by the land administrator. Since Wan Mohamed Zain was not a party to the sale transaction, this would mean that whatever he said before the land administrator was based on what was told to him by his brother, Wan Abdullah, which would make his statement in P1 a hearsay.

[74] As regards to Wan Mohamed Zain's SD in P9, we observed that it was made 18 years after his testimony before the land administrator and six years after the death of Wan Abdullah. The SD sought to embellish the details of the oral transaction, especially the exact purchase price paid to Wan Mek which should have been mentioned by Wan Abdullah and Wan Mohamed Zain to the land administrator in their testimonies in 1992 and 1994 but were not. The SD was obviously an afterthought and recently invented to support the plaintiff's claim that valuable consideration had passed from her father to Wan Mek to entitle him to claim beneficial ownership of the said land. In addition, considering that the SD was made some 43 years after the death of Wan Mek and by a person who was not a party to the alleged oral agreement, and long after the direct party to the sale transaction had passed on, whatever was stated

in the SD was mere hearsay which had no probative value in law to prove the plaintiff's assertion of an oral sale of the said land from Wan Mek to Wan Abdullah.

[75] We were of course mindful that in law not all hearsay evidence is inadmissible. It all depends on the object of the introduction of the evidence. This was explained by the Privy Council in the celebrated case of *Subramaniam v Public Prosecutor* [1956] MLJ 220 in the following manner:

> Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

[76] In the instant case, it is as clear as daylight that the plaintiff's object in introducing the sworn statements of Wan Abdullah and Wan Mohamed Zain in exhs P1 and P9 was not to establish the fact that those statements (regarding the oral agreement between Wan Mek and Wan Abdullah) were made by them, in which case they were not hearsay and not inadmissible. Rather, her object in introducing those statements was to establish the truth of those statements, in which case they were hearsay and inadmissible. Hence, based on the authority of *Subramaniam v Public Prosecutor*, exhs P1 and P9 were pure documentary hearsay which were inadmissible as evidence and even if they were admissible as evidence, very little if any weight could be given to them.

[77] In *Kong Ming Trading Sdn Bhd v MTS Construction & Trading Sdn Bhd & Anor* [2017] 3 MLJ 267; [2016] 1 LNS 1343 it was held that the law is trite that inadmissible evidence remains inadmissible irrespective of whether any objection was raised to its admission.

[78] Thus, the learned JC ought not to have relied on exhs P1 and P9 as the basis of his findings that an oral agreement existed between Wan Mek and Wan Abdullah regarding the sale of the two undivided shares to Wan Abdullah.

[79] In so far as the oral testimonies of the plaintiff and her aunt (SP2) relating to the oral agreement are concerned, again as they were not based on their personal knowledge regarding the transaction but on information they received from Wan Abdullah and Wan Mohamed Zain, these evidence were hearsay evidence which were not admissible to prove the truth of the plaintiff's claim.

[80] The fact that the plaintiff's testimony was hearsay evidence could be seen from her answers to the following questions during examination-in-chief

which read as follows:

Soalan: Adakah kamu tahu bila dan bagaimana jual-beli ini berlaku?

Jawapan: Saya tidak tahu secara jelas tetapi Wan Abdullah mula memberitahu saya sejak tahun 1980-an lagi bahawa beliau telah membeli tanah-tanah tersebut dari Wan Mek pada masa Wan Mek masih hidup. Saya dimaklumkan oleh Wan Abdullah juga Wan Mek berhasrat menjual bahagiannya di dalam tanah-tanah tersebut kepada Wan Abdullah kerana Wan Mek memerlukan sumber kewangan dan adalah lebih mudah dijual kepada Wan Abdullah kerana Wan Abdullah dan Wan Mek telah berkongsi milikan mengikut bahagian masing-masing di dalam tanah-tanah tersebut.

Soalan: Adakah kamu tahu berapa harga yang telah dibayar oleh Wan Abdullah kepada Wan Mek?

Jawapan: Seingat saya, saya diberitahu oleh Wan Abdullah bahawa beliau membeli kedua-dua tanah ini daripada Wan Mek dengan harga keseluruhan sebanyak RM4,000.00 dan dibayar sepenuhnya kepada Wan Mek.

Soalan: Adakah kamu pernah melihat bayaran ini dibuat?

Jawapan: Saya tidak lihat sendiri bayaran dibuat tapi saya ada ingat ada beberapa kali Wan Mek datang ke rumah Wan Abdullah dan dimaklumkan oleh Wan Abdullah bahawa Wan Mek datang mengambil wang jualan tanah-tanah tersebut.

[81] As in the case of exhs P1 and P9, it was also clear that the plaintiff's object in introducing Wan Abdullah's and Wan Mohamed Zain's statements in her testimony was not to establish the fact that they were made to her, but rather to establish the truth of these statements, which rendered those statements hearsay and inadmissible as evidence.

[82] Similarly, SP2's testimony showed that her knowledge about the transaction came from Wan Abdullah. It was therefore not safe for the learned JC to rely on the oral testimonies as proof of the plaintiff's case. As was cautioned by Chang Min Tat FCJ (as he then was) in his oft-quoted passage in the case of *Tinduk Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119:

... For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. *Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.*

Circumstantial evidence of oral agreement

[83] As stated earlier, quite apart from relying on exhs P1 and P9 and her own and SP2's oral evidence, the plaintiff had also relied on various actions taken by Wan Abdullah vis a vis the said land as indication of the existence of an oral agreement. These circumstantial evidences relate: (i) to his uninterrupted possession and occupation of the two lots; (ii) his physical custody of the issue documents of title; (iii) his payment of quit rent for Lot 505 and Lot 1001; and (iv) his construction of a house on Lot 505 and cultivation of rubber and other fruit trees on Lot 1001.

[84] Having examined these so-called circumstantial evidences, we were of the view that that they did not serve the plaintiff's case in the sense that they arose mainly as incidents of a land held under co-proprietorship as expressly provided in the NLC.

On uninterrupted possession and occupation of the land

[85] Nothing much turned on this fact. The explanation is simple. Land held under co-proprietorships are governed by Part twenty-one of the National Land Code ('the NLC') encompassing ss 342–345. In particular, s 343 which deals with the incidents of co-proprietorship provides in para (1)(b) as follows:

> (1) Where any land is vested in two or more persons or bodies as co-proprietors —
>
> (a) ...
>
> (b) they may at any time apply for the partition of the land under Chapter 2 of Part Nine*, but, so long as their co-proprietorship continues, shall each be entitled to the possession and enjoyment of the whole*.

[86] What this means is that when land is held under a co-proprietorship, each co-proprietor is entitled to the possession and enjoyment of the whole of the land, unless by agreement of the co-proprietors a specific area equivalent to a co-proprietor's undivided share(s) in the land has been specifically carved out or delineated for the exclusive use of that co-proprietor. There was no evidence before the court that any specific area on Lots 505 and 1001 had been delineated for the exclusive use of Wan Mek and Wan Abdullah had been occupying those areas.

Physical custody of issue document of title

[87] This fact is again neutral and of no help to the plaintiff's case. This is because s 343(2) of the NLC provides that the issue document of title to any land held under a co-proprietorship shall, in the absence of agreement between the co-proprietors as to its custody, be retained by the Registrar of Titles. Hence, Wan Abdullah's custody of the issue documents of title of the two said

lots was more an incident of co-proprietorship than as evidence of the sale of Wan Mek's undivided shares to him.

Payment of quit rent

[88] It is clear that under the NLC, quit rent is imposed in respect of each document of title, irrespective of whether it is held under a single proprietor or multiple proprietors, as in the case of a co-proprietorship. There is no provision for a co-proprietor to pay quit rent according to his proportionate undivided share in the land. Quit rent is calculated in accordance with the rules made under s 14(1)(e) of the NLC and the rates (psm x total area of land) are calculated based on the category of land use. Under s 93 quit rent is a debt due to the state authority and non-payment of quit rent will subject the land to forfeiture as provided under s 100. So nothing turned on the fact that Wan Abdullah had been paying the quit rent on behalf of the other co-proprietors for Lots 505 and 1001.

[89] In any case, as was rightly pointed out by learned counsel for the defendant, the plaintiff failed to produce a single quit rent receipt during the trial to prove the veracity of her assertion. Nor did she produce a single photograph of her father's house on Lot 505 or the rubber and other fruit trees supposedly planted on Lot 1001 to the court. The defendant, on the other hand, claimed that the two lots are actually vacant lands. In the absence of any documentary evidence, the plaintiff's evidence on these matters remained as bare averments or assertions.

Concept of a bare trustee

[90] With regard to learned JC's reliance on the case of *Temenggong Securities Ltd & Anor* (cited to him by learned counsel for the plaintiff) to hold that after the payment of the purchase price and taking over of possession by Wan Abdullah, Wan Mek had become a bare trustee of the two undivided shares for Wan Abdullah, we were inclined to agree with the learned counsel for the defendant that the factual matrix in this case did not support such a finding.

[91] In this case, it could be discerned from the evidence before the High Court that: (i) the date of the alleged oral agreement was uncertain, though it was said to be sometime in the 1950's; (ii) the purchase price was uncertain and was somewhere between RM4,000 (according to Wan Abdullah and plaintiff) — RM5,000 (according to Zahrudin in P3); (iii) it was uncertain when the purchase price was paid to Wan Mek, whether it was paid in one lump sum on one occasion when Wan Mek paid a visit to Wan Abdullah at his house (according to Wan Abdullah and SP2) or in three installments (according to the plaintiff); (iv) date of payment of the purchase price was unknown; (v) no

receipt or acknowledgment was given by Wan Mek in respect of the payment; and (vi) the first time a claim was made of an alleged oral agreement by Wan Abdullah was some 26 years after Wan Mek's death.

[92] One can hardly describe the above factual scenario in this case as giving rise to a bare trusteeship between Wan Mek and Wan Abdullah.

[93] On our part we are more inclined to adopt the concept of a bare trustee as laid down by the Federal Court in its later decision in the case of *Borneo Housing Mortgage Finance Bhd v Time Engineering Bhd* [1996] 2 MLJ 12; [1996] 2 CLJ 561 (cited by learned counsel for the defendant) in which it was held that the concept of a seller holding the land as a bare trustee for a purchaser only arises in the following situation:

> In our view, the contractual events, which result in the vendor becoming a bare trustee of the land the subject matter of the agreement of sale and purchase for the purchaser, is on completion, that is to say, upon receipt by the vendor of the full purchase price, timeously paid and when the vendor has given the purchaser a duly executed, valid, registrable transfer of the land and in due form, in favour of the purchaser, for it is then that the vendor divests himself of his interest in the land.

[94] In our view this is a more correct proposition in the light of the various provisions in the NLC governing dealings in land. In this case, apart from the uncertainty in the terms as set out earlier, there was no evidence of Wan Mek having given any duly executed, valid, registrable transfer of the said land in a proper instrument of transfer (Form 14A) in favour of Wan Abdullah. Thus, there was no way the concept of bare trustee as described in *Borneo Housing Mortgage Finance Bhd* could apply to this case.

[95] For completeness of this judgment, we would further add that as rightly pointed out by learned counsel for the defendant, even if there was such an oral agreement, Wan Abdullah and the plaintiff were guilty of laches and indolence. As we had stated earlier, dealings in any alienated land are governed by the elaborate provisions in the NLC, in particular, ss 206 and 207 provide for registration of a transfer via a formal instrument of transfer in Form 14A and s 323 provides for the entry of a caveat by a purchaser to protect his registrable interest or title in any land pending the registration of the transfer. Wan Abdullah did not avail himself of any of these provisions either under the previous Land Enactment of Kelantan 1938 (26 of 1938) or the NLC upon its coming into force on 1 January 1966.

[96] There was no valid reason for Wan Abdullah during his life time not to pursue his claim while Wan Mek was still alive or immediately after her death. He waited for 26 years after her death in either in 1966 or 1969 to file his claim for the said land in 1992.

[97] We were inclined to agree with learned counsel for the defendant that the reasons given by Wan Mohamed Zain on behalf of Wan Abdullah in P1 and his SD for the non-transfer of the two undivided shares was a lame excuse and an afterthought because there was ample time for Wan Abdullah to effect the transfer from the time of the purchase allegedly in the 1950's to the time of Wan Mek's death in either 1966 or 1969, and there are provisions in the NLC for the Registrar of Titles to correct any errors in any document of title (including the name of the registered proprietor) (see s 380(1)).

[98] Based on the forgoing discussions and analysis, we were of the view that there was no judicial appreciation by the learned JC when he accepted, without due regard to the law relating to hearsay evidence, the evidence adduced by the plaintiff in toto that there was an oral agreement between Wan Mek and Wan Abdullah for the sale of the said land, which rendered his findings plainly wrong to warrant appellate intervention (see: *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97 (CA) and *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1 (FC)).

[99] As clearly enunciated by this court in the case of *Sivalingam a/l Periasamy & Anor v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545) through Gopal Sri Ram and Mahadev Shankar JJCA:

> It is trite law that this court will not readily interfere with the findings of fact arrived at by the court of first instance to which the law entrusts the primary task of evaluation of the evidence. But we are under a duty to intervene in a case where, as here, the trial court has so fundamentally misdirected itself, that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion.

[100] We further observed that the learned JC also misdirected himself on the law regarding the burden of proof of a defendant in a civil case. He had in finding in favour of the plaintiff held that the defendant had completely failed to prove his defence which he found to be nothing more than a bare denial and an afterthought. Now as previously discussed, the law is trite that until and unless the plaintiff had discharged the onus on her to prove her case on a balance of probabilities, the burden did not shift to the defendant to prove his defence and no matter if the defendant's case was completely unbelievable, the claim against him must be dismissed (see: *Johara Bi binte Abdul Kadir Marican v Lawrence Lam Kwok Fou & Anor* and *UN Pandey v Hotel Marco Polo Pte Ltd* [1980] 1 MLJ 4).

[101] In *UN Pandey v Hotel Marco Polo* Sinnathury J in dismissing the plaintiff's case held at p 4:

A It is not often realised that in civil cases, as much as in criminal cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case the prosecution's burden is a heavy one. In a civil case, it is on a balance of probabilities. But the proof is that the balance must be tilted by the plaintiff before the defendant makes his case.

B

[102] We were entirely in agreement with learned counsel for the defendant that the plaintiff in the instant case had failed to discharge her evidential burden of establishing a prima facie case against the defendant on a balance of probabilities. Consequently, there was simply no case for the defendant to C answer or rebut.

DECISION AND ORDER

[103] For the aforesaid reasons, we had allowed the appeal with costs and set D aside the order of the High Court. We awarded agreed costs of RM15,000 to the defendant for here and below and also ordered deposit to be refunded.

Appeal allowed.

E Reported by by Afiq Mohamad Noor

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